BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODNEY G. HAGUE	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket No. 1,010,041
	)	
AND	)	
	)	
KEMPER INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the December 23, 2003 Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on May 18, 2004.

APPEARANCES

Phillip R. Fields of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties agreed claimant suffered a 12 percent functional impairment to the body as a whole as a result of his work-related bilateral upper extremity injuries. The dispute in this matter concerns claimant's work disability. Specifically, the issue is whether claimant made a good faith job search.

The ALJ found claimant made a good faith job search and, therefore, averaged his 100 percent actual wage loss with the 32.5 percent task loss to find claimant entitled to a 66 percent work disability.

Respondent disputes the ALJ's finding that claimant made a good faith effort to find employment following his layoff and contends a wage should be imputed to him based upon his ability to earn wages. Conversely, claimant argues his post layoff job search was appropriate and in good faith. Claimant, therefore, asked that the ALJ's Award be affirmed. Whether claimant's actual post-injury wages should be utilized in computing his work disability or whether instead a wage should be imputed to him based upon his ability to earn wages is the only issue for the Board's review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the ALJ's Award should be affirmed.

Claimant resides in Peabody, Kansas. He worked for respondent in Wichita, Kansas, from June 6, 1989, until he was laid off in January 2003. After his layoff, claimant applied for work with numerous employers, not only in Peabody, but also in Newton, Marion, Hesston, Moundridge, Hillsboro, Walton, and Durham, Kansas. These cities ranged in distance from approximately 18 to 30 miles from Peabody. Respondent argues claimant should have included Wichita in his job search. Although claimant was willing to commute from Peabody to Wichita while working at Boeing, claimant was unwilling to drive that 100 miles round trip for work that paid substantially less than what he was earning while working for respondent.

Claimant argues that excluding Wichita from his job search was reasonable and he has made a good faith effort to find appropriate employment. Respondent argues that not only is claimant more likely to find work in Wichita than in the small towns where claimant has applied for work so far, but also he is more likely to find higher paying jobs in Wichita than in those other communities. For these reasons and because claimant had commuted to Wichita to work in the past, it is reasonable to expect claimant to include Wichita in his job search. Respondent contends claimant's job search efforts do not rise to the level of constituting a good faith effort and, therefore, a post-injury wage of $510 a week should be imputed to the claimant based upon the testimony of claimant's vocational expert, Jerry Hardin. Comparing a post-injury wage of $510 to claimant's pre-injury average weekly wage of $1,583.84 would result in a 68 percent wage loss.

Because claimant suffered an “unscheduled” injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e(a), which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e(a), the worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[3]

The term "good faith" does not appear in the Workers Compensation Act and, therefore, there is no statutory definition for that term. The Kansas Appellate Courts have indicated that good faith should be determined on a case-by-case basis.[4]

In this instance, the Board agrees with the ALJ's finding that the claimant's decision not to include Wichita in his job search was reasonable and that his efforts otherwise satisfy the good faith requirement. It is understandable that claimant would be unwilling to commute 100 miles to and from work for a job that pays approximately one third of what he was earning with the respondent. Claimant's job search efforts have included areas 18

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

[3] Id. at 320.

[4] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

to 30 miles from his residence. Although his efforts have thus far proved unsuccessful and, therefore, claimant should consider expanding his job search area, the Board notes claimant was laid off in January 2003 and the regular hearing was held in this case on September 2, 2003. Accordingly, it would take some time for claimant to exhaust the potential job market within the 30-mile area he has selected. Nevertheless, what may constitute good faith at one point in time may not satisfy the burden of proof over a longer period.[5] Claimant's education, training and experience are relative factors to be considered as is the community in which he resides. Although the Board has on occasion indicated that a 50-mile radius may be an appropriate distance for some claimants and, under some circumstances, in this case and at the point in time that the record closed, the Board concludes claimant's efforts were reasonable and constituted good faith.[6] Accordingly, the ALJ's decision should be affirmed.

AWARD

WHEREFORE, the Board affirms the December 23, 2003 Award entered by Administrative Law Judge Nelsonna Potts Barnes.

IT IS SO ORDERED.

Dated this _____ day of September 2004.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[5] *See Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

[6] *See, e.g.*, *Sommers v. Future Beef Operations*, No. 1,006,366, 2004 WL 1517743 (Kan. WCAB Jun. 30, 2004); *Davis v. Kansas Offset Printing*, No. 258,958 & 268,677, 2003 WL 221504416 (Kan. WCAB Aug. 13, 2003); *Hudson v. Harper Trucks, Inc.*, No. 198,149, 2000 WL 372300 (Kan. WCAB Mar. 31, 2000).